No. 14913

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KEENAN PIPE & SUPPLY COMPANY, a corporation,

Appellant,

vs.

B. E. SHIELDS, as Trustee in Bankruptcy of JAMES T. INMAN,

Appellee.

Brief of Amicus Curiae in Support of Position of Appellant Keenan Pipe & Supply Company, Filed by Glen Behymer at the Request of Building Material Dealers Credit Association.

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Foreword.

The statement of the case and of the facts has been rather fully presented by counsel for Appellant. In this Brief of *Amicus Curiae,* therefore, the writer will confine himself primarily to the legal points involved, discussing the facts only to the extent deemed necessary with respect to the proper consideration of the law applicable thereto.

We have, in the case at bar, a situation where the proof adduced and the stipulations made at the trial establish definitely the following facts:

1. One Deeter, as prime contractor, and the bankrupt, as a plumbing subcontractor, were engaged in the

construction of extra work on a State of California Public Works job, the California Epileptic Hospital at Porterville, California.

2. This subcontractor who was engaged to perform, as an independent contractor, the plumbing work on the job in question, purchased from the appellant materialman, Keenan Pipe & Supply Company, plumbing materials for use in and which were used in the performance of the said subcontract and, therefore, in the performance of the prime contract.

3. While the right still existed, permitting the materialman to, for its protection, follow one or both of the following courses:

(a) File a Stop Notice or Notice to Withhold with the public body letting the contract; or

(b) File an action against the prime contractor and his surety on the mandatory Public Works Bond which had been furnished in compliance with the California statutes;

the prime contractor, desiring to prevent reflection on his credit and, presumably, to avoid paying counsel fees to the materialman in the event suit was brought on either the Stop Notice or on the Bond, or both, agreed directly with the materialman that if the latter would not file such Stop Notice or Verified Notice to Withhold, he, the prime contractor, would pay direct to the materialman the sum of $5,416.63, the amount of the materialman's bill, for the materials furnished for use in and used in the performance of said work.

4. The materialman kept its agreement and refrained from filing either Stop Notice and suit thereon or suit on the Public Works Bond.

5. The prime contractor kept his agreement to pay the amount owing to the materialman, and, in order to have a check as additional evidence showing that he was also discharging, *pro tanto,* his indebtedness to the subcontractor arising out of the aforesaid job, made the check payable to both the materialman and the subcontractor. The subcontractor, pursuant to an antecedent agreement so to do, endorsed the check and delivered it to the materialman, who deposited same in the materialman's bank account.

6. Before the materialman agreed to furnish, and did furnish, these materials for use in said job and more than four months prior to the bankruptcy of the aforesaid subcontractor, the materialman extended credit to the subcontractor upon the understanding that the prime contractor would pay the labor payroll of the subcontractor for the labor performed in this extra work, and upon the further understanding that the materialman would be paid for the materials furnished by the said materialman upon completion of the job and out of the job funds.

The foregoing is the statement of the essential facts with respect to the public works job involved in this action.

The facts stipulated and proved before the trial court establish a very similar situation with respect to the pri-

vate job involved in this action and with respect to materials furnished by the same materialman to the same subcontractor on a private job on which the same prime contractor acted as prime contractor. The following are the only differences:

(a) The amount involved and paid to the materialman, being also the amount of the debt owing by the subcontractor to the materialman for materials furnished for use in and used on said job, was $769.00.

(b) The materialman, at the time of payment of said sum, had, instead of a right to file a Stop Notice or sue on the prime contractor's Bond, an inchoate right to record a claim of Mechanic's Lien against the property upon which the materials had been furnished and used.

(c) Within the period during which the right to record a Claim of Lien for the purpose of perfecting the lien existed, the check for $769.00 was given directly by the prime contractor to the materialman, without the signature of the subcontractor being added thereto, and at a time when the materialman was threatening, at least by implication, to record a claim of Mechanic's Lien, the prime contractor desiring at the time, to prevent the blemish on his credit that would attach if a Lien were filed. Thereby the materialman relinquished both the inchoate right of Lien, estopped himself from filing the Claim of Lien, saved the prime contractor's credit from jeopardy and prevented the owner from having a right of action against the prime contractor for permitting the claim of Lien to be recorded against the owner's property.

Questions Involved.

As the writer sees it, this case turns upon the answers to the following questions:

(1) If a materialman, while he still has right to file a claim of Mechanic's Lien for materials furnished at the instance and request of a subcontractor, and furnished on a job basis, by an agreement direct with the prime contractor, waives the right to file his Claim of Lien in exchange for the contractor's agreement, made direct with him, that the prime contractor will pay direct to the materialman, the amount of the aforesaid material bill for materials used in the prime contractor's job and embraced within the requirements of the prime contractor's contract with the owner and if, in consummation of said agreement, payment is actually made within the Lien period to the materialman directly by the prime contractor, is the materialman entitled to retain the moneys so paid to him by the prime contractor as against the claim of a Trustee in Bankruptcy of the subcontractor, the payment by the prime contractor to the materialman having been made within four months prior to the bankruptcy of the subcontractor, assuming, for the purposes of this question, that the subcontractor was, at the time of the payment by the prime contractor, insolvent, and that the materialman had reasonable cause to believe that the subcontractor was insolvent?

(2) If the materialman who has furnished to the subcontractor, for use in a public works job, materials which

have been used in said job and while the materialman has an existing timely right to file a Stop Notice or Verified Notice to Withhold on a California Public Works job and has the right also to timely file an action against the prime contractor and his surety upon the Labor and Material Bond furnished under the mandatory provisions of the California Public Works Bond Act, makes a direct agreement with the prime contractor by which the materialman waives the right to file such a Stop Notice and agrees not to do so in exchange for an agreement made by the prime contractor with him that the prime contractor will pay direct the amount of the material bill, and if the materialman keeps his agreement, made with the prime contractor, on the consideration aforementioned, and, thereafter receives the check of the prime contractor, payable both to the materialman and the subcontractor and endorsed immediately by the subcontractor and cashed by the materialman, through the medium of depositing the check in his own account, entitled to retain the proceeds of said check in the exact amount of the materialman's bill on said job, as against the claim of the Trustee in Bankruptcy of the Estate of the subcontractor, the payment having been made within four months prior to the date of bankruptcy, assuming, for the purposes of this question, that the other aspects of a voidable preference appear?

ARGUMENT AND LAW.

POINT I.

This Case Is of Great Public Importance for Two Reasons: First, It Affects Very Seriously the Building Industry, One of the Largest Industries in the State of California, and Especially Affects Every Material Dealer and Many Subordinate Subcontractors; Second, It Sets Up a Ruling, if Upheld on This Appeal, That Will Make It a Difficult Task for Materialmen to Adopt the Ordinary and Customary Procedures Which for Years Have Been Adopted by Them to Preserve and Protect Their Interests Under the Salutary Provisions, as To Private Work of the Mechanics' Lien Law of the State of California and, as to Public Work, Under the Salutary Provisions of the California Public Works Bond Act and the California Statutes With Respect to the Cognate Right of Filing With the Public Body That Let the Prime Contract the Verified Claim or Stop Notice That Is the Equivalent to the Protection Afforded by a Mechanics' Lien on Private Work. The Procedure Suggested by the Ruling in the Trial Court Seems to Be to the Effect That the Only Way That the Materialman Can Protect His Interests Under These Laws, Founded Upon a Great and Wise Public Policy, Is to Actually Embarrass the Prime Contractor Involved in the Matter With the Actual Filing of a Mechanic's Lien on Private Work and With the Actual Filing, on Public Work, of the Stop Notice, or an Action Against the Prime Contractor and His Surety on the Statutory Labor and Material Bond, or Both. It Is the Practically Universal Custom in the Building Industry for the Materialman to Advise the Prime Contractor of His Unpaid Claim and to Insinuate, at Least, That, if It Was Not Paid Before the Ex-

piration of the Time to Record a Claim of Mechanic's Lien or, if the Matter Be a California Public Work, Before the Time Expires to File a Stop Notice or Notice to Withhold With the Public Body, the Materialman Intends to Do so Unless the Prime Contractor Will Pay Him Direct the Amount of the Bill Owed to Him by the Subcontractor. It is Likewise the Well Nigh Universal Practice, Where the Prime Contractor Is Presented with This Demand, to Make Out a Joint Check to the Subcontractor and the Materialman for the Amount of the Materialman's Bill, so That the Materialman Will Be Estopped From Adopting Any Procedure Protecting His Interests by the Actual Recording of the Claim of Lien or the Stop Notice, and so That the Prime Contractor Will Have Evidence That Through the Payment Made to the Materialman in This Manner, It Being Understood That the Subcontractor Will Endorse the Check Forthwith, so That the Materialman May Cash the Same, That as an Incident to the Prime Contractor's Agreement to Pay the Materialman Direct, the Prime Contractor Has Discharged, Pro Tanto, Any Amount That He May Owe the Subcontractor on the Job in Question. The Business Procedure Actually Adopted as an Habitual Practice in the Building Industry and Adopted in This Case, Through the Use of Either a Check Payable Solely to the Materialman for the Amount of His Bill, or a Joint Check for the Purposes Indicated Above, Is Consistent With the Practical Aspect of Business as It Is, and Should Be, Conducted. The Prime Contractor Usually Prefers the Medium of the Joint Check Procedure, and Is, More or Less, in a Position to Dictate the Course to Be Followed.

The widespreading scope of the effect of the decision of the Court below, and the great interest it has aroused in the industry has resulted in the request for permission to file this Brief, tendered by *Amicus Curiae.*

POINT II.

These Liens of Mechanics Against the Structure, Where Private Work Is Concerned, and Against the Fund in the Hands of the Public Body, Where Public Work Is Concerned, Are Liens of the Highest Dignity and Based Upon Equity and Natural Justice.

English v. Olympic Auditorium Co., 217 Cal. 631;

Jones v. Great Southern Fireproof Hotel Co., 86 Fed. 370, 30 C. C. A. 108;

Provident Institution for Savings v. Mayor of Jersey City, 113 U. S. 506, 28 L. Ed. 1102, 1106.

So impressed was the United States Supreme Court with the natural justice and equity of such claims, that in the last mentioned case it went so far as to say:

> "We are not prepared to say that a legislative act giving preference to such liens, even over those already created by mortgage, judgment or attachment, would be repugnant to the Constitution of the United States."

The California Supreme Court has expressed a similar feeling with respect to a kindred lien, in the case of *Mortgage Securities Co. v. Pfaffman,* 177 Cal. 109 at 113-114. The last mentioned action, it is true, had to do with the lien of the mechanic on an item of personal property which had not been affixed to real property, but held that the Lien claimant's possessory lien on the item of per-

sonal property into which his materials and labor had been incorporated was prior and paramount to a previously existing valid chattel mortgage, despite the provisions of Section 2897 of the Civil Code.

POINT III.

The United States Congress, in Its Enactment of the Bankruptcy Law, Has Seen Fit to Preserve Liens in Favor of the Laborers, Mechanics or Contractors Which Arise From the Performance of Labor or Furnishing of Material, Even Though It May Be Necessary, in Order to Perfect That Lien, to File Some Statutory Notice Under the Local Law, and That Such a Lien Is Not One Obtained by "Legal Proceedings" Within the Meaning of Clause (1) of Subdivision (a) of Section 67 of the Bankruptcy Act (11 U. S. C. A., Sec. 107(a), F. C. A. Title 11, Sec. 107(a)) as Amended by the Amendatory Act of 1938. The Courts Have Held That This Is True, Notwithstanding That Legal Proceedings Are Contemplated by the State Lien Statute and Required for the Enforcement of the Lien.

Henderson v. Mayer, 225 U. S. 631, 56 L. Ed. 1233;

In re New York-Brooklyn Fuel Corporation (C. A. 2), 11 F. 2d 802;

Tube City Mining and Milling Co. v. Otterson, 16 Ariz. 305, 146 Pac. 203, L. R. A. 1916(e) 303;

Moreau Lumber Co. v. Johnson, 29 N. Dak. 113, 150 N. W. 563, L. R. A. 1915(f) 1132.

POINT IV.

The Lien of a Subcontractor, Laborer or Materialman for Services Rendered or Materials Furnished the Principal Contractor Is Not Nullified by the Bankruptcy of the Principal Contractor. This Is True Whether We Have to Do With a Mechanic's Lien on the Structure in the Case of a Private Job or the Lien in Favor of Materialmen, Created by Statute, Against Funds Due or to Become Due to the Prime Contractor From the Public Body Which Funds the Public Body Is Compelled to Withhold When Legal Notices of Claims Have Been Served on That Public Body.

Burr v. Commonwealth, 212 Mass. 534, 99 N. W. 323;

Burr v. Mass. School for Feeble Minded, 197 Mass. 357, 83 N. E. 883;

National Fireproofing Co. v. Daley, 76 N. J. Eq. 35, 74 Atl. 152;

Vanderlip v. Walker, 144 Misc. 629, 259 N. Y. Supp. 289, 21 Am. Bankr. Rep. (N. S.) 638;

In re Roy Emslie, 102 Fed. 291 (C. C. A. 2), 4 Am. Bankr. Rep. 147;

In re Ray Weston, 69 F. 2d 913, 98 A. L. R. 319 and annotations commencing at page 323;

In re Caswell Construction Co., 13 F. 2d 667.

POINT V.

There Are No Equitable Considerations in Favor of General Creditors of a Bankrupt Contractor Which Should Defeat the Lien of a Mechanic or Materialman Who Has Done Work or Furnished Material to Such Contractor; Every Creditor Dealing With a Debtor Does so With the Knowledge That Those Who Are Furnishing Labor or Materials for a Building Can, if They Choose, Acquire a Priority of Payment Over Other Creditors, Either by Recording a Claim of Lien Upon the Structure, Where Private Work Is Involved, or Taking Such Steps as Will Establish a Claim on the Fund in the Hands of the Public Body, Where Public Work Is Involved.

In re Emslie, 102 Fed. 291, 4 A. B. R. 127;
In re Cramond, 145 Fed. 966, 17 A. B. R. 22.

POINT VI.

A Mechanic's Lien Is Not a Lien Given by Way of Preference to Secure a Pre-existing Debt. Such Liens Come Rather Under the Exceptions of Section 67(d) of the Bankruptcy Act, Which Provides That Liens Given or Accepted in Good Faith, and Not in Contemplation of or in Fraud Upon the Bankruptcy Act, and for a Present Consideration, Which Have Been Recorded According to Law, If Recording Thereof Is Necessary in Order to Impart Notice, Shall Not Be Affected by the Bankruptcy Act. (Remington on Bankruptcy, 3rd Ed., Sec. 1430.)

The reason for the decisions and the statutes in this respect are that the liens of subcontractors and materialmen against a building or against a fund are given by the State statutes and stand on a different basis than the voluntary act of the bankrupt. The lien is not con-

sidered an encumbrance created by the debtor, and it has been said that even if such lien be understood to be a contractual lien, or arising out of a contract authorizing the labor and materials to be furnished, still it is supported by a consideration, and is preserved against invalidation through a provision in the Bankruptcy Act excepting from the four-months provision all Liens given or accepted for a present consideration.

Therefore, the service of a Stop Notice upon the owner or the filing of a Mechanic's Lien, or the creation of the Lien right, by the State Constitution or statute plus the action of the materialman in furnishing the materials are all involuntary in so far as the contractor is concerned, and hence not invalidated as a voluntary transfer by the contractor.

Fehling v. Goings, 87 N. J. Ed. 375, 58 Atl. 642, 12 A. B. R. 154.

See also:

In re Emsley, 102 Fed. 291 (C. C. A. 2), 4 A. B. R. 127;

Dwelle-Kayser Co. v. Noon, 140 Wisc. 475, 250 N. Y. Supp. 714;

Vanderlip v. Walker, 144 Misc. 629, 259 N. Y. Supp. 289, 21 A. B. R. (N. S.) 638;

In re New York-Brooklyn Fuel Corp., 11 F. 2d 802 (C. C. A. 2);

American Bowling Co. v. Central Tr. Co., 240 Fed. 401 (C. C. A. 7);

In re Caswell Constr. Co., 13 F. 2d 667, 8 Am. Bankr. Rep. (N. S.) 31;

National Fireproofing Co. v. Daily, 76 N. J. Eq. 35, 74 Atl. 152;

Geo. Lowe & Co. v. Leary, 49 Utah 506, 164 Pac. 1052, 32 A. B. R. 774.

POINT VII.

Not Only the Materialman Creditor Who Extends Credit to a Subcontractor, or Prime Contractor, Knows That He Has the Right, if on a Private Job, to Record a Claim of Lien, and, if on a Public Job, to File a Stop Notice Against the Funds in the Hands of the Public Body, but This Is Also Known to All the General Creditors of the Prime Contractor, as Well as All the General Creditors of the Subcontractor.

The claimant who has furnished materials or labor on the particular job has a right to rely, in extending his credit to the general contractor or the subcontractor, on having the special Lien against the property or the fund accorded by the State law, and knowing this, is not at any time primarily concerned with the credit of the subcontractor. If on public works, he knows, in most States, including California, when he extends credit that he is protected by the bond written by the surety acting as surety for the general contractor, as well as by his direct right of action against the prime contractor, who is principal on that bond, and he is entitled to rely upon this additional cumulative and independent protection accorded to him by the State law.

Other creditors having claims against either the subcontractor or general contractor, not of a lienable nature, know the state of the law, and extend credit well knowing that those who have sold on a job basis their materials or performed their labor have a preferred position if they protect themselves by recording a claim of Mechanic's Lien or filing a Stop Notice, as the case may be. Even those employed on the same contract of the same general contractor know that if certain lienors comply

with the Mechanics' Lien Law in taking the steps necessary to protect their inchoate right of Lien, by either recording a claim of Mechanic's Lien on private work or a Stop Notice against the fund in the hands of the public body on public work, while others on the same job do not do so, the former acquire a priority over the latter in a fund owing to the bankrupt contractor.

In re Cramond, 145 Fed. 966, 17 A. B. R. 22.

Creditors of the general contractor, subcontractors under the general contractor, and materialmen, all know that when the owner begins to construct his building and engages a general contractor, and the contractor purchases materials or employs laborers or hires subcontractors, they all act with the Mechanics' Lien Law in view and with the knowledge on the part of all that the liability of the original contractor to materialmen, laborers and subcontractors, within the scope of the contract, may, on the failure of the contractor to meet that liability, be enforced against the property or the fund. (*Eberle v. Drennan,* 40 Okla. 59, 139 Pac. 162, 51 L. R. A. (N. S.) 68.) The Court in this case observed that it would be:

> ". . . a strange anomaly if, when that very condition arises and the original contractor affords himself of the bankruptcy statute, the law, which was made to protect such of his creditors, would then, when needed most, wholly fail."

See also:

Chicasan Hotel Co. v. Barker Const. Co., 135 Tenn. 305, 186 S. W. 115, L. R. A. 1916F 106, 31 A. B. R. 916.

POINT VIII.

In the Case at Bar It Must Be Remembered That at the Time When Payment Was Made by the General Contractor to the Materialman Direct, That, While by so Doing He Was Incidentally Extinguishing the Indebtedness Owed by the Subcontractor to the Materialman, He Was Making a Payment to the Materialman in Exchange for a Direct Present Consideration Moving From the Materialman to the Prime Contractor, to wit: on the Public Works Job the Surrender of a Valid, Subsisting Right to File a Stop Notice or Verified Claim and Any Right on the Part of the Materialman to Sue Him, Along With the Surety on the Public Works Bond. A Present Consideration Was Moving From the Materialman to the Prime Contractor in Exchange for a Present Consideration Moving From the Prime Contractor to the Materialman, to wit: on the One Hand, Payment of the Sums Due to the Materialman for Materials Furnished for Use in and Used in the Prime Contractor's Job, and, on the Other Hand, Surrender of Present Existing Valuable Rights, Against a Third Party Independently Liable to the Materialman.

It would be a silly thing to require the idle act of embarassing the prime contractor's credit, increasing expense to him unnecessarily for under the law among the costs that the prime contractor would have to pay in a suit either on the Stop Notice or upon the Public Works Bond would be the counsel fees of the successful Plaintiff. The day that the prime contractor signed his signature as principal on the statutory Labor and Material Bond and the surety for the prime contractor attached its

signature, all as required by law, each of these parties became indebted directly to anyone who might furnish materials to any subcontractor on the job in question for the full value of the materials furnished. The direct right of action on the Bond ripened when the moneys became due to the materialman from the subcontractor. The right to file the Stop Notice existed from any time after the materialman finished furnishing its materials and until the expiration of the statutory period for filing Stop Notices.

As to the Mechanics' Lien right, the California Constitution gives the right and permits the legislature merely to "provide, by law, for the speedy and efficient enforcement of such liens." The Lien dates back to the time when the first work is done or the first materials furnished by anyone in connection with the building contract. When the materialman on the private work waives the right to file his Claim of Lien he exchanges with the prime contractor, in return for the payment of his claim, a present valuable consideration in the shape of the waiver of the right to actually record the Claim of Lien. The mere incident that, in addition to the prime contractor paying the materialman the amount of his claim, there follows the legal consequence that, involuntarily the subcontractor has substituted the prime contractor as the owner of the claim theretofore held by the materialman is of no consequence.

POINT IX.

It Must Be Remembered That All of the Remedies Whether on Private or Public Work, That Are Given to a Materialman Who Sells Materials to a Subcontractor Are Separate, Distinct and Cumulative Remedies, Whether by Way of Stop Notice, Action on the Bond or Mechanic's Lien.

Sudden Lbr. Co. v. Singer, 103 Cal. App. 386, 390;

Holden v. Mensinger, 175 Cal. 300, 304;

Frater's Glass & Paint Co. v. So. Western Construction Co., 200 Cal. 688, 692-693;

General Electric Co. v. American Bonding Co., 180 Cal. 675, 679;

Cooley v. Freeman, 204 Cal. 59;

Pneucrete Corp v. U. S. F. & G., 7 Cal. App. 2d 733;

Sunset Lbr. Co. v. Smith, 91 Cal. App. 746;

Harvard v. Jurian, 35 Cal. App. 757;

Purington v. Olsten, 45 Cal. App. 621;

Associated Oil Co. v. Commory-Peterson Co., 32 Cal. App. 582, 589.

In view of this situation, how in common sense can it be said that if the prime contractor, under his direct liability, discharges his direct debt to the materialman for a present consideration moving to him and of great value to him, has made a payment which can be recovered by a Trustee in Bankruptcy of the subcontractor who has become bankrupt merely forsooth that, as an incident to the discharge of the prime contractor's direct debt, for a valuable consideration the contractor has discharged a separate and distinct obligation which the sub-

contractor happens to owe to the materialman from whom he has purchased the materials and the prime contractor has by such payments fulfilled his duty to the owner, whether that owner be a private party or a public body? The prime contractor has received a direct consideration from the materialman, the owner of the property has had the value of his property increased by the incorporation of those materials in the structure and the law has said that the materialman is entitled to extend credit to a subcontractor in reliance upon the proposition that he is going to be paid for those materials through the independent remedies furnished to him by law.

It is a matter of common knowledge, and every creditor of every subcontractor knows, that the whole credit structure of the building industry is based upon the following fundamental principles: hardly any subcontractor or prime contractor could undertake the volume of business that he is compelled to undertake in order to attempt to remain solvent if he could not get greater credit than he would ever be entitled to otherwise, through the medium of the credit protection given to him by reason of the fact that the law contains salutary, equitable and absolutely indispensable provisions by which other direct obligations are created against third parties and Liens are furnished either against the real property improved or against the funds in the hands of a public body. The public could not obtain public work at as low a cost as it is obtained by said public but for the fact that every materialman knows that as he furnishes a dollar of value of materials going into the public structure there directly arises, in his favor, by reason of that fact against the prime contractor and his surety (with neither of whom he has any direct contractual relationship), a direct obli-

gation on the part of the prime contractor and his surety to pay for that dollar's worth of materials. Similarly, by reason of the fact that no right of Lien exists on public work, the Legislature has provided a remedy by way of a mandatory Stop Notice, which must be regarded with favor by any Court for the reason that, since no right of Lien exists on the public work, the remedy thus afforded is a form of equitable subrogation.

Suisum Lbr. Co. v. Fairfield School District, 19 Cal. App. 595;
Bates v. Santa Barbara, 90 Cal. 543, 546-547;
Butler v. Ng Chung, 160 Cal. 438.

How can it be said, under these circumstances, that the assets of the bankrupt have been diminished by the surrendering, on the one hand, by the materialman, of his independent right of action against the third party by his waiver of the right to record a Claim of Lien or file a Stop Notice, while the right does still exist to do so, in exchange for the present payment of the independent obligation owed by the prime contractor? Upon the Stop Notice or the Lien or the suit on the Bond being carried forward by the materialman, an offset against any claim on the part of the subcontractor in a sum equal to the amount of the materialman's claim, which has been paid in exchange for such Release, is immediately created and all that has actually happened is to substitute the prime contractor or the bonding company, or both, as creditors of the subcontractor in the same amount, these parties having stepped into the shoes of the materialman to that extent.

The effect of a contrary theory would be to deprive the materialman of the independent right given to him by wise and essential statutory provisions.

The materialman in this case at bar had the absolute right, at the time, to pursue the separate independent remedies hereinbefore referred to on the respective jobs and surrendered those remedies in exchange for present payment by the prime contractor. In the case at bar the materialman, as a Lien claimant on private work, in the one instance, and as a furnisher of materials on public work, in the other instance, stands in a preferred position. The payment by the prime contractor was in response to a direct obligation on his part. Under the Bond, on the one hand, and on the other hand, in discharge of his obligation to the owner on the private work to keep that property free of Mechanics' Liens.

It would seem to be the doing of an idle act to require the actual filing of a Stop Notice or the actual recording of a Claim of Mechanic's Lien before the materialman could accept payment from the prime contractor of the debt in question. The prime contractor, knowing of the claims, and without the threat of the filing of any Stop Notice or recording of any claim of lien on private work, or action upon the Bond, in order to keep his credit standing and protect himself from unnecessary costs, might tender directly to the materialman (after having verified the correctness of his account, and after having verified the further legal fact that the right still existed on the part of the materialman to take the legal procedures open to him), the amount owing to the materialman. Must the materialman then reject that amount, fearing that possibly the subcontractor was a doubtful financial risk and might ultimately go into bankruptcy and such a suit as in the case at bar might follow, actually file his Stop Notice, actually record his Claim of Lien or his suit on the Bond, as the case may be, and then, and then

only, accept the sum which the prime contractor is ready, willing and eager to pay? Such a situation would, indeed, burden the building industry with the performance of idle acts against public policy, to the detriment of the credit of the prime contractor and contrary to what is a prudent, careful and proper business practice on the part of all parties concerned.

It does not appear to the writer of this Brief that there is anything in either the letter or the spirit of the Bankruptcy Act which requires any such course, and it appears that both equity and justice, as well as the law and common sense, impel the conclusion reached in the case of: *Jackson v. Flohr,* 119 Fed. Supp. 305 (U. S. D. C., W. D., Wash.), cited in the Brief of the Appellants. If to so hold, under the facts of this case, requires in any measure the overruling by this Honorable Court of the decision in *San Mateo Feed and Fuel Co. v. Hayward,* 149 F. 2d 875, that decision should be overruled.

The reasoning of the Court in *Jackson v. Flohr, supra,* is absolutely sound, is consistent with the undoubted legislative intent of Congress and with fundamental common sense and realistic in every respect. The law does not look with favor upon the performance of idle acts. There is no fundamental difference in the California and Washington statutes on the subject of Mechanics' Liens. It is true that there is an additional condition precedent to the right of Lien under the Washington law, to wit, the requirement that a materialman must, within five days after he has commenced the delivery of the materials, give to the owner a written notice that he has commenced to do so. Otherwise, he forfeits his right to a Lien. From that point forward the mechanics are identical.

In the case at bar the prime contractor, at the same stage of the proceedings as was involved in the Washington case above referred to, discharged his moral and legal obligation to the materialman while the right to record claim of Lien or file Stop Notice still existed and in exchange for a present valuable consideration as between prime contractor and materialman. Under such circumstances, we are really at a loss to understand how on earth it can be reasonably argued that this transaction between prime contractor and materialman resulted in a voidable preference because the transaction occurred within four months prior to the bankruptcy of the subcontractor.

It is true that under Section 67(b) of the Bankruptcy Act there is a limitation on transfers by the debtor of his own property. However, he made no such transfer. The prime contractor paid an obligation which the prime contractor owed and it violates common sense to conclude that by the prime contractor paying a debt that he owed to the materialman, directly to the latter, there is a voidable preference in bankruptcy merely because, as an incident to the discharge of this independent debt owed by the prime contractor, there was extinguished the obligation that the subcontractor owed to the materialman. It seems against all reason that the Bankruptcy Act or any of its sections should be so construed as to assume that Congress intended any such unjust and unreasonable end result as that contended for by the Trustee in Bankruptcy in this case.

Let us assume, so far as a private job is concerned, that the materialman was unpaid for materials, and the owner of said property, and not the prime contractor, learned that the materials were furnished either to his prime contractor or to one of the latter's subcontractors

and the materialman was about to record a Claim of Lien unless the owner paid the bill, and the owner tendered payment therefor. Can it reasonably be contended under these circumstances that the materialman would first have to record his Claim of Lien, antagonize the owner and possibly, by reason of the antagonization thus created, be required to go through the trouble, expense and delay of a Mechanic's Lien foreclosure action, the end result of which was known to be inevitably in the materialman's favor? It does not stand to reason that any such end result is contemplated under any proper construction of the Bankruptcy laws of the United States of America and especially under any of the provisions of Section 67(b) or Section 60 of the Bankruptcy Act.

Respectfully submitted,

GLEN BEHYMER,

Amicus Curiae.